

## **Department Response to Comments Submitted on the March 22, 2006 Draft Permit Modification**

\*\*\*The Department would like to emphasize that, as stated in the Department's March 21, 2006 Public Notice, and in accordance with 40 CFR 124.5(c)(2), only the changes proposed in the permit modification are open for public comment. Any comments that were not associated with the March 22, 2006 draft permit modification are outside the scope of this permit modification proposal and cannot be addressed at this time.

### **Comments Submitted by RETEC on behalf of BNSF Railway Company**

1. **BNSF's Comment:** During review of the modified Permit, a couple of questions arose concerning Permit duration and review. Section I.C.2. indicates that the Permit is effective for ten years unless 'modified, terminated, or revoked'. Section I.C.3. also indicates that the Permit will be reviewed by MDEQ every five years. Do these Permit modifications extend the effective date of the Permit from October 2011 to May 2016? Do these modifications constitute the 5-year review or will the Permit be reviewed again in October 2006?

**Department Response:** BNSF raised the question of Permit duration in their March 3, 2005 letter on the permit modification, and the Department responded on April 18, 2005. The Department's April 18, 2005 letter stated, "It is stated in 40 CFR Part 270.50 (a), "RCRA permits shall be effective for a fixed term not to exceed 10 years." and 40 CFR 270.50(b)... "the term of a permit shall not be extended by modification beyond the maximum duration specified in this section." Based on these regulations the Department has determined the extension of permit MTHWP-01-02 cannot exceed the 10-year expiration date of October 9, 2011."

Regarding the five year permit review, these modifications do not constitute the 5-year review which the Department conducts in accordance with 40 CFR 270.50(d) and as specified in Condition I.C.3. The five year permit review will be conducted in October 2006.

2. **BNSF's Comment:** A revised Operations and Maintenance (O&M) Manual was sent to MDEQ on November 17, 2005. According the Permit section III.I.1.b., any changes to the O&M Manual must be approved by the Department. Revisions that were incorporated into the revised O&M Manual are reflected in the revised O&M Manual can be implemented at the Site. At this time, the information included in the modified Permit does not agree with the current O&M Manual and Department approval of the revised O&M Manual is required so that the two documents will be in agreement.

**Department Response:** Condition III.I.1.b. requires Department approval of the O&M Manual, but such approval does not require a permit modification. The Department will send BNSF approval of the November 2005 O&M Manual in a separate document.

## **BNSF General Comments**

3. **BNSF's Comment:** The Burlington Northern Santa Fe Railway Company should be changed to either BNSF Railway Company or BNSF throughout the revised Permit.

**Department Response:** In January 2005, the State was notified that 'Burlington Northern Santa Fe Railway Company' changed their name to 'BNSF Railway Company'. Conditions I.A. and V.P.1. were modified in the draft permit modification to reflect this name change. To maintain consistency throughout the Permit, Conditions I.H.3., I.H.12., I.H.12.a., I.H.13.a., and sentence one of Condition V.P.1. has been modified to reflect BNSF Railway Company's current name.

4. **BNSF's Comment:** BNSF requests that all references to LTD Plots in the Permit indicate that they were clean closed.

**Department Response:** The Department approved the clean-closure certification of the LTD Plots on September 23, 2003. In the draft permit modification, Condition I.A.1.a. was modified to state the LTD Plots were closed. The Department will clarify Condition I.A.1.a. to state the LTD Plots were clean closed. To maintain consistency with the Permit modifications, Conditions II.B. and V.C.5. have also been modified at this time to state the LTD Plots were clean closed.

5. **BNSF's Comment:** SI/WP should be changed to SI/WPU throughout the revised Permit. This change was not consistent throughout.

**Department Response:** Several Conditions were modified in the draft permit modification from "WP" to "WPU". To maintain consistency of the modifications throughout the Permit, the Department has modified Condition V.N.1.b. from "WP" to "WPU" at this time.

6. **BNSF's Comment:** BNSF requests that all references to Circular DEQ-7 values be replaced with Circular DEQ-7 (February 2006) values, similar to the footnote in Attachment IV.2, Table 2.

**Department Response:** Circular DEQ-7 values are the Montana Numeric Water Quality Standards. Circular DEQ-7 is regularly updated as additional information or guidance from EPA becomes available. Exceedances of Circular DEQ-7 Standards would be considered a violation of Montana Water Quality Standards and subject to enforcement action. Based on the technical impracticability of cleaning up groundwater contamination at the BNSF site to groundwater protection standards, an Alternate Concentration Limit (ACL) has been granted, but an ACL does not provide BNSF with approval to contaminate off-site waters above the current State Standards.

References to Circular DEQ-7 are found in Attachment IV.2, Table 2, Condition IV.D.3.a.viii., and Condition IV.D.3.b.vii.

Attachment IV.2, Table 2's reference to February 2006 Circular DEQ-7 values was to provide the reader with the location of the specific numbers provided in the table. As a result of BNSF's comment, the Department has placed a footnote in the table to clarify that the values in the table will be modified if Circular DEQ-7 standards for the constituents listed in the table are updated. BNSF has developed site-specific values for an ACL; if Circular DEQ-7 values fall below the BNSF-developed ACL values, then BNSF can propose to solidify the ACL values at the site-specific developed values.

Condition IV.D.3.a.viii. has been removed from the Permit. Please see Department response to BNSF comment number 21.

Condition IV.D.3.b.vii. will not be modified to include reference to Circular DEQ-7 February 2006 values since, as stated above, BNSF must meet current Circular DEQ-7 values for off-site wells and POE wells. Reference to February 2006 values would thus require modification of the Condition whenever Circular DEQ-7 standards are updated.

### **BNSF Specific Comments**

#### **7. BNSF's Comment: I.A.1.a. – Permitted Units**

BNSF requests that all references to LTD Plots in the Permit indicate that they were clean closed. Text in this Condition "and two closed land treatment demonstration plots" would be replaced with "and two clean closed land treatment demonstration plots".

**Department Response:** Condition V.C.5 was modified in the draft permit modification to specify the LTD plots have been clean closed. To maintain consistency throughout the Permit, Condition I.A.1.a. was also modified to state the LTD plots have been clean closed.

#### **8. I.H.12.b. – "Owner – Section 18"**

BNSF does not own any property in Section 18, Township 19 North, Range 25 West, Sanders County, Montana. This property is solely owned by Richard L. Hamm. Please remove BNSF from this Condition.

**Department Response:** BNSF and Mr. Hamm appeared to be in a property dispute when the original permit MTHWP-01-02 was issued and therefore, the Department chose to involve both parties in the definition of Section 18. The Department notes that BNSF should be removed from the definition of "Owner-Section 18". However, as explained in the Department's opening statement, this condition was not modified in the March 22, 2006 draft permit modification and therefore must be modified at a later date.

#### **9. II.B. – Regulated Units**

BNSF requests that the LTD Plots be removed from the regulated units listed in the Permit. In 2002, soils in the LTD Plots were excavated to a depth of five feet below ground surface and analytical results indicated that remaining soils were below

residential clean-up standards of 17 ppm cPAH. As a result, the LTD Plots were clean closed in 2002 and should no longer be subject to regulation.

**Department Response:** Condition V.C.5. was modified in the draft permit modification to reflect the LTD Plots were clean closed. To maintain consistency throughout the Permit, the LTD Plots were removed from Condition II.B. and Condition II.B.1. was inserted which specifies that the soils in the LTD Plots were risk-based clean closed and therefore the LTD Plots are not subject to requirements in the Permit. Condition I.H.16 was also modified to reflect changes made to Condition II.B.

**10. II.H. – General Inspection Requirements**

BNSF observed that the inspection schedule in Module VIII should also be included in this Condition.

**Department Response:** The Department has incorporated BNSF's comment in Condition II.H. of the Permit modification.

**11. II.P.1. – Annual Monitoring and CAMU Operations Report**

Condition II.P.4.a. – Annual Performance and Evaluation Report should be included under Section II.P.1. as the PRS is included in the CAMU. BNSF suggests relocating Condition II.P.4.a. to Condition II.P.1.c.

Section II.P.1. should refer to the “annual land use control notice” required in Section V.K.6. BNSF suggests including this reference as Condition II.P.1.d.

**Department Response:** This comment is not related to the March 22, 2006 permit modification and, therefore, the Department cannot address BNSF's request to relocate Condition II.P.4.a. to Condition II.P.1. at this time. Please see the Department's opening statement for further explanation.

Condition V.K.6. was modified in the draft permit and should have been reflected in Condition II.P.1. The Department has included reference to Condition V.K.6. in Condition II.P.1.c.

**12. II.P.1.b.i.**

The sampling and reporting frequency for SI/WPU monitoring has been revised as a result of these Permit modifications. As a result, BNSF requests that the following changes be made to the text in this Conditions: revise “A summary of the quarterly (SI/WP) and semi-annual (LTU) groundwater...” to “A summary of the annual (POC) and semi-annual (LTU and POE) groundwater...”

**Department Response:** This comment has been incorporated to maintain consistency with the draft permit modifications.

**13. II.P.2. – Semi-Annual (LTU) and Quarterly (SI/WP) Groundwater Monitoring Reporting**

Due to the change in sampling frequency, BNSF requests that “Semi-Annual (LTU) and Quarterly (SI/WP)” be removed from the Section title leaving “Groundwater Monitoring Reporting”.

**Department Response:** This comment has been incorporated to maintain consistency with the draft permit modifications.

**14. II.P.4. – Product Recovery System Performance Evaluation Reporting**

Due to the request to move Condition II.P.4.a. to Section II.P.1., BNSF recommends this Section be renamed to “Product Recovery System 5-year Performance Evaluation Report” and be revised to include the information currently located in Condition II.P.4.b.

**Department Response:** This comment is not related to the March 22, 2006 draft permit modification and, therefore, the Department cannot address BNSF’s comment at this time. Please see the Department’s opening statement for further explanation.

**15. Attachment II.1 – Location of Regulated Units**

BNSF requests that the LTD Plots be labeled as clean closed. A revised Facility Diagram has been included with these comments.

**Department Response:** To maintain consistency with the draft permit modifications, this comment has been incorporated.

**16. Attachment II.3 – Inspection Schedules**

BNSF Requests that the LTD be removed from the footnote listing the units to be inspected in Table 9-1 and Figure 9-1 included in this attachment. Revised pages have been included with these comments.

**Department Response:** To maintain consistency with the draft permit modifications, this comment has been incorporated.

**17. IV.B.8.c.i. – Semi-Annual LTU and SI/WPU Reporting**

Due to the change in sampling frequency, BNSF requests that the title for this Condition be revised to “Groundwater Monitoring Reporting”. This will be consistent with titles in Module II of this Permit.

In addition, BNSF requests that the following text be removed from this Condition: “on a semi-annual basis for the LTU and the SI/WPU. The results must be reported”. The requirement to report analytical results to the Department within 30-days after receiving the analytical results is clear and does not require additional clarification.

**Department Response:** The Department has changed the title of Condition IV.B.8.c.i. to “Groundwater Monitoring Reporting”.

The first sentence of Condition IV.B.8.c.i. is provided for clarity and will not be modified.

**18. IV.C.4.a.i. – Principal Hazardous Constituents (PHCs)**

BNSF requests that the text “and two hazardous metals” be removed from this Condition. Attachment IV.2, Table 1 is referenced in this section and no metals are listed in this table.

**Department Response:** This discrepancy is noted, but is beyond the scope of this permit modification. The text “and two hazardous metals” cannot be removed at this time. Please see the Department’s opening statement for further explanation.

**19. IV.C.5.g.i.**

This Condition refers to Condition IV.C.5.f.ii., it appears the proper reference is Condition IV.C.5.g.ii.

**Department Response:** The Department has incorporated BNSF’s comment into Condition IV.C.5.g.i. of the permit modification.

**20. IV.D.2. – Product Recovery**

The list of PRS recovery wells is included in Condition III.I.2.a. Listing the wells again in this Section is redundant as Module III is also referenced in this Section. BNSF suggests that the text starting with “The 17 product...” and the list of wells be removed from this section.

**Department Response:** The Department will not remove the list of wells from this Condition. Listing the PRS wells in both the CAMU and Groundwater Monitoring Modules is helpful for those who are not closely familiar with the Permit.

**21. IV.D.3.a.viii. – Monitoring Wells 48 and 49A**

BNSF requests that this Condition be removed from the Permit. Justification for the removal is three-fold.

- i. In 1991, PAH concentrations in wells 48 and 49A were demonstrated to be originating from SWMUs, not the LTU (RETEC, September 1991).
- ii. 48 and 49A are part of the POC network where compounds are routinely detected at levels which exceed DEQ-7 values.
- iii. 48 and 49A are located within the CGA where there is no potential for residential exposure, thus the wells should not be evaluated at drinking water standards.

These wells are analyzed as part of the POC network and are evaluated annually as per Condition IV.D.3.a.vi. and Attachment IV.5.

**Department Response:** The Department provided the proposed language found in Condition IV.D.3.a.viii. in a letter to BNSF dated April 18, 2005. BNSF concurred with the Department’s proposed language in a letter dated June 13, 2005.

Monitoring wells 48 and 49A are part of the POC well network, but also were part of the LTU monitoring network. In accordance with 40 CFR 264.97(b), separate monitoring systems are not required for each regulated unit. Therefore, monitoring wells 48 and 49A were removed from the LTU monitoring network and the Department kept language (Condition IV.D.3.a.viii.) in the Permit modification to emphasize that contamination in these wells may possibly be from the LTU and such a possibility must be reviewed.

Based on BNSF's comment on the draft permit modification, the Department will again modify the Permit to accommodate BNSF's concerns regarding monitoring wells 48 and 49A. The Department will remove Condition IV.D.3.a.viii. from the Permit and include language in Condition IV.D.3.a.vii. to address possible contamination from the LTU (cells 1-4). The new language will state, "If monitoring wells 48 or 49A are identified as having exceedances, the analysis must identify the area of either the land treatment unit or surface impoundment that is non-compliant."

**22. *IV.D.3.b.ii. – POE Monitoring Frequency***

BNSF requests that the word "late" be removed from the sampling frequency. Historic groundwater monitoring from the UGGS database has indicated that low riverflow stages are observed to begin in September, which is early fall.

**Department Response:** The Department has incorporated BNSF's comment into Condition IV.D.3.b.ii. of the permit modification.

**23. *Attachment IV.1 – Figure 1 and Figure 2***

BNSF proposes to replace these two figures with one figure that will show all three sampling networks. In addition, the figure currently included as Figure 1 includes wells 48 and 49A in the LTU network. They are no longer included (IV.D.3.a.viii). The figure currently included as Figure 2 has "Proposed" in the title and does not include well 27. A revised figure has been included with these comments for inclusion in the final modified Permit.

**Department Response:** The Department has incorporated BNSF's revised figure into the Permit modification and has removed the current Attachment IV.1 Figures 1 and 2.

**24. *Attachment IV.2***

The title page has a typo in the Table 2 title. "PIC" should be changed to "POE".

**Department Response:** The Department has incorporated BNSF's comment into Attachment IV.2 of the permit modification.

**25. *Attachment IV.2. – Table 2***

BNSF requests that the units for all compounds be included after the parameter to be tested instead of in the column headers. The unit ug/L does not apply to the water quality indicator parameters.

BNSF also requests that an additional footnote be added to the table to clarify that POC wells are analyzed for PAH compounds by EPA Analytical Method 8270 and that the required EQL/MDL is 1.0 ug/L for each PAH compound.

**Department Response:** The Department has modified Attachment IV.2. Table 2 to reflect BNSF's comments.

**26. *Module V – Table of Contents***

The Table of Contents should be updated to reflect the Module's current organization, specifically Sections V.C.3., V.C.4., and V.K.1.-7.

**Department Response:** The Department has corrected the Table of Contents to reflect the Module's modifications.

**27. *V.A.1.d.***

BNSF requests that this Condition be removed from the Permit. The LTD Plots were clean closed in 2002 and should no longer be included as a regulated unit.

**Department Response:** To maintain consistency with modifications to the permit, the LTD Plots have been removed from Condition V.A.1.d.

**28. *V.C.3. – Closure Performance Standards for Storage Tanks T-6 and T-7***

This Section was left blank. BNSF proposes the following text be added:

The Permittee shall close Storage Tanks T-6 and T-7 in accordance with the Closure Plan included as Attachment V.4.

**Department Response:** The Department has incorporated BNSF's comment in Condition V.C.3. of the permit modification.

**29. *V.C.5. – Clean Closure of the Land Treatment Demonstration (LTD) Plots***

In 2002, soils in the LTD Plots were excavated to a depth of five feet below ground surface. Analytical results from soil samples collected from the remaining side-walls and floor indicated that remaining soils were below the residential clean-up standards of 17 ppm cPAH. Due to this, BNSF requests that this Section be revised to read the following:

In 2002, the Permittee completed closure of the LTD Plots. Soils located within the LTD Plots were excavated from 0-5 ft bgs. Samples were then collected from the walls and floor of the excavation. Analytical results indicated that all remaining soils were below the residential risk based value of 17 ppm cPAH. The excavation was backfilled with clean fill and seeded. In addition, historical below treatment zone and groundwater monitoring results confirm that no releases were ever recorded from the LTD Plots. As a result, the LTD Plots have been clean closed to residential levels.



**Department Response:** The Department will not include BNSF's suggested language in Condition V.C.5. However, the Department did modify the Condition to clarify that the Department approved the closure certification and that closure followed the requirements in the LTD Plot's closure workplan. Specifics of the closure procedures are more appropriately placed in the LTD Plot's closure work plan.

**30. V.K.1. – *Controlled Groundwater Area (CGA)***

This Section indicates that groundwater from the Site cannot be used for purposes other than remediation. BNSF has an agreement with the local fire department that well PW-7 can be used to fill tanks for fire fighting purposes. BNSF would like to continue being a good neighbor and recommends that the text be changed to include that that water from PW-7 can be used for "remediation or emergency response".

**Department Response:** The Controlled Groundwater Area (CGA) designation is under the authority of the Department of Natural Resources and Conservation (DNRC). Changes to the CGA must be discussed with the DNRC, not the Department of Environmental Quality. The Department has modified Condition V.K.1. to clear up confusion on authority over specifics of the CGA. The second sentence of Condition V.K.1. has been modified to state, "Use of site groundwater for any purpose other than remediation must be reviewed by the DNRC."

**31. V.K.2.-V.K.6. (IV.K.2.-IV.K.6.)**

The headers should indicate Module V instead of Module IV.

**Department Response:** The Department has incorporated BNSF's comment into Conditions V.K.2. – V.K.6 of the permit modification.

**32. V.K.2.a.i. – *Deed Restriction***

BNSF requests that the sixth bullet be removed from the Permit. Section I.E.12. addresses the requirements of transferring facility ownership or operation and states that new owners or operators would be required to meet the conditions set forth in this Permit. New owners or operators would be required to comply with Section III.L. of this Permit, which specifies the duration of PRS operations. As a result, the Deed Restriction does not need to include provisions for the operation and maintenance of the PRS System.

**Department Response:** The Department removed bullet 6 from Condition V.K.2.a.i. of the permit modification.

**33. *Attachment V.5***

Section V.K.1. indicated that CGA designation is included as Attachment V.5. The draft permit modification included only the strike-out version of the previous Attachment V.5. No information was included for the CGA.

**Department Response:** The Department has placed the CGA in Attachment V.5.

**34. VIII.B. – Permitted Waste Storage**

BNSF requests that the table showing permitted waste storage in Tanks T-6 and T-7 be revised to include both Hazardous Waste No. **K001** and **F034**.

**Department Response:** The Department has included Hazardous Waste Number F034 in Condition VIII.B.

**35. III.G.1.a. – Daily Inspection**

This condition requires inspection of the tank system daily during operations. Site operations do not require a full-time operator. As the Site operator is part-time, BNSF is concerned that this Condition requirement will limit product recovery to only those days that the operator is on-site.

**Department Response:** The Department is assuming BNSF meant to comment on Condition VIII.G.1.a., not Condition III.G.1.a., and has responded to BNSF's comment based on that assumption.

The Department cannot be less stringent than requirements set forth in the Code of Federal Regulations (CFR) as incorporated by reference in the Administrative Rules of Montana (ARM). Daily inspection during operations is required in 40 CFR 264.195(b). The Department interprets the term "operations" to mean that when the tanks contain hazardous waste, then the tank is "operating".

As an alternate to requirements in the CFR, the Department can allow requirements that are equivalent to the requirements in the CFR. If BNSF would like to propose an alternative condition that is equivalent to 40 CFR 264.195(b), the proposal can be reviewed for modification of Condition VIII.G.1.a. at that time. BNSF did not propose alternative requirements to the CFR in their comment, therefore, the Department cannot consider modification of Condition VIII.G.1.a. at this time.

**36. Attachment VIII.2 – Daily and Weekly Inspection Log**

BNSF requests the title of this attachment be revised to "Daily Operations and Weekly Inspection Logs" for accuracy. In addition, two copies of the Daily Operation Log were included in this attachment instead of one copy of the Weekly Inspection Log and one copy of the Daily Operation Log.

**Department Response:** The Department has modified the title of Attachment VIII.2 to read "Daily Operations and Weekly Inspection Logs".

The Department apologizes if BNSF received a copy of the draft permit modification with two copies of the Daily Operation Log instead of one copy of the Weekly Inspection Log and one copy of the Daily Operation Log. The Department believes all other copies of the draft permit modification had the appropriate attachments for Attachment VIII.2.

*BNSF also made comments on Module III of Permit MTHWP-01-02. Module III was not modified in the March 22, 2006 draft permit modification proposal, therefore, BNSF comments on Module III are beyond the scope of this permit modification and cannot be addressed at this time. Please see the Department's opening statement for further explanation. BNSF had ample time prior to issuance of the draft permit modification for public comment to propose further changes and clarification to the Permit. At this point in the process, further suggested changes cannot be addressed without going through another permit modification and public comment process. The Department has noted BNSF's comments on Module III and will review them during the Department's 5-year review of the Permit as specified in Condition I.C.3.*

#### **Worden Thane P.C. (WTPC) Comments submitted on behalf of Rick Hamm**

1. **WTPC Comment:** In Module I, p. 15, reference is made to Certificate of Survey 1007. That certificate of survey was not filed in accordance with Montana Law and is therefore void *initio*. A void certificate of survey has no legal effect whatsoever and cannot serve to have provided notice, either actual or constructive. See. Johnstone v. Sanborn, 138 Mont. 467, 501-02, 358 P 2d 399, 416 (1960). Moreover, the language "notifications to the deed" is vague and ambiguous. Again, a void document cannot serve as either actual or constructive notice.

**Department Response:** This is the first time it has been brought to the Department's attention that COS 1007 was not filed in accordance with Montana law and is void *initio*. The Department will pursue this assertion and, if necessary, modify the permit to reflect changes with COS 1007 at a later date. The Department cannot modify Condition I.H.2.b. at this time because 1) It was not modified in the draft permit modification and therefore is not open for public comment during this permit modification (see the Department's opening comment for further explanation), and 2) further investigation into the assertion that COS 1007 was inappropriately filed must be conducted.

The Department also notes that COS 2462 should be included in the Permit. The Department was not provided a copy of the signed COS 2462 and therefore was not aware that it was final and ready to include in the Permit. COS 2462 will be included in the Permit during the next permit modification.

2. **WTPC Comment:** The following comments apply to Module II, paragraph B, page 1, paragraph "Surface Impoundment": There is no attachment II.2 contained in the copy of the draft permit that I received; as noted above, Certificate of Survey 1007 has no legal effect since it was improperly filed and therefore void; BNSF has no ownership interest in the Section 18 property; the requirement that post-closure activities "must accord" with conditions in Modules IV and V is vague and ambiguous. There are numerous provisions in Modules IV and V that have no application whatsoever to the Section 18 property. It is not clear which provisions of Modules IV and V are being referred to.

**Department Response:** Many items of Permit MTHWP-01-02 were not included in the March 22, 2006 draft permit modification package because changes were not made to much of the Permit. Comments are only allowed on items that were modified during the March 22, 2006 proposed modification. Please see the Department's opening statement for further explanation. Attachment II.2 was not modified, and therefore, was not included in the draft permit modification package. Mr. Hamm should be in possession of the final permit MTHWP-01-02 and Attachment II.2 can be referred to in that document. The Plains public library and the Department also have copies of MTHWP-01-02 available for public review.

As stated above, the Department has received no prior notice that COS 1007 was improperly filed and void. Such claims are noted and will be pursued at a later date.

Post-closure activities for the regulated units must accord with all Conditions in Modules IV and V. However, modified Conditions in Module V (i.e., V.C.3 and V.C.4.) removed specific requirements for Section 18 since risk-based clean closure of Section 18 surface soils has been completed. Therefore, to address WTPC's comment, and be consistent with modified portions of the Permit, Section 18 was removed from Condition II.B., and Condition II.B.1. was inserted which specifies that the surface soils in the Section 18 portion of the Surface Impoundment were risk-based clean closed and therefore, once Condition V.K.8. has been completed (as discussed below), Conditions of the Permit no longer apply to the portion of the surface impoundment located on Section 18.

To maintain consistency with the changes to Condition II.B. throughout the Permit, the Section 18 portion of the surface impoundment was also removed from Condition V.A.1.b. and placed in a new Condition V.A.1.c. with reference to Condition V.K.8. as described in the Department's response to WTPC's comment number 3 below.

3. **WTPC Comment:** The following comments are made with regard to Module IV: the deed notices required under the draft modified permit are overly broad as related to Section 18; Mr. Hamm has agreed with the State of Montana and the Department that covenants and deed restrictions affecting approximately one and one-half acres of the Section 18 property are appropriate. The agreement is memorialized in a draft covenant and deed restriction attached as "Exhibit A" hereto. Any further obligations that the draft permit modification would impose upon the Section 18 property are not clear and are objected to as a taking of Mr. Hamm's property which would require compensation.

**Department Response:** The Deed notices required in Conditions IV.K.2. (which should have been provided as V.K.2.) are requirements for the portion of the facility owned by BNSF Railway Company. Clarification to this effect has been placed in the Permit.

The Department agrees that Mr. Hamm has agreed to covenants and deed restrictions affecting the one and one-half acres of the Section 18 property. Since the covenant and deed restriction, provided by WTPC as "Exhibit A", has not been finalized, Condition

V.K.8. will be added to the Permit, stating the following: “The one and one-half acres of the surface impoundment located on Section 18, Township 19 North, Range 25 West, Sanders County, Montana must file the draft covenants and deed restriction provided in Attachment V.6., or an equivalent deed restriction approved by the Department, within thirty (30) days after completion of this permit modification.” The Department does not expect this to be a problem since the draft covenants and deed restrictions have been agreed upon by both parties.

The Department also notes that “Exhibit A” provided by WTPC includes reference to the legal description of Section 18 in COS 1007, which WTPC claims is void in comment numbers 1 and 2 above.

#### **Other Department Changes to the Permit Modification**

1. Condition I.H.16 provides a list of the regulated units referred to in this permit. To maintain consistency with the permit modifications, the newly permitted storage tanks T-6 and T-7 were added to this Condition.